



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 14, 1995

Mr. Everette D. Jobe
General Counsel
Texas Department of Banking
2601 N. Lamar Boulevard
Austin, Texas 78705-4294

OR95-119

Dear Mr. Jobe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 24948.

The Texas Department of Banking (the "department") received a request for "a copy of all Funeral Homes that have a permit to sell Funeral Merchandise in the State of Texas" and information relating to "[a]ll Funeral Homes that have violations." You claim the requested information is excepted from required public disclosure under sections 552.101 and 552.103 of the Government Code.

Section 552.103(a) excepts information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To be excepted under section 552.103(a), information must relate to litigation that is pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

You state that the requestor is the plaintiff in a lawsuit against the department and claim that "the requested information concerns the matters at issue in that suit." You have not, however, submitted any pleadings that would show how the records relate to the litigation nor have you provided us with any other information about the litigation that would demonstrate that the records relate to the litigation. Accordingly, you have not met your burden to demonstrate that the requested records *relate* to reasonably anticipated or pending litigation. You may not withhold the requested records under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information deemed confidential by statutory law. Section 8(c) of article 548b, V.T.C.S., provides that

[a]ll information obtained, either directly or indirectly, by the Department *relative to the financial condition of any seller* whether obtained through examination or otherwise, except published statements, and all files and records of the Department relative thereto shall be confidential [Emphasis added.]

A "seller" is defined as "a person selling, accepting funds or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or policies of insurance to fund prepaid funeral benefits in this state." V.T.C.S. art. 548b, § 1(b)(10). In turn, the term "prepaid funeral benefits" is defined as

prearranged or prepaid funeral or cemetery services or funeral merchandise, including caskets, grave vaults, and all other articles of merchandise incidental to a funeral service. The term does not include a grave lot, grave space, grave marker, monument, tombstone, crypt, niche, or mausoleum unless it is sold in contemplation of trade or barter for services and merchandise to which this Act applies.

Id. § 1(b)(9).

For information to be "relative to the financial condition of" a prepaid funeral permit holder and thus confidential under section 8(c) of article 548b, V.T.C.S., it must reveal either specific financial information about the company or general information about the overall financial stability of the company. Information that relates more generally to a company's business practices and does not reveal specific financial information or general information about the company's overall financial stability is not made confidential by section 8(c).

You state that a list of permitted funeral homes is maintained by the department and have submitted the list for our review. You claim, however, that the list includes additional information not requested by Mr. Donaldson. As the requestor seeks only the names of the permitted funeral homes, the department is *not required* to release the

additional information. However, we note that we have found nothing in the list relative to the overall financial condition of the sellers. The list is not confidential under section 552.101 as it incorporates section 8(c) of article 548b, V.T.C.S. Accordingly, the department may choose to release the entire list or only the names of the permitted funeral homes.

You state that the department does not maintain a list of funeral homes that have violations. The Open Records Act applies only to information in existence and does not require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992); 572 (1990); 430 (1985). However, a governmental body is required to make a good-faith effort to relate a request to information in its possession. Open Records Decision No. 561 (1990). You claim that the only records of funeral homes that have violations are contained on the actual reports of examination and that providing copies of all the examination reports would be unduly burdensome. The act does not permit the custodian of records to consider either the cost or the method of supplying the requested information. Open Records Decision No. 467 (1987) at 5. We note, however, that the custodian of records may require the requestor to post bond as a condition precedent when the preparation of requested information is unduly costly and reproduction would cause "undue hardship" if costs were not paid up front. Gov't Code § 552.263; Open Records Decision No. 467 (1987) at 6-7.¹

You have submitted one examination report for our review. You contend that all the examination reports that would be responsive are confidential in their entirety under section 8(c) of article 548b, V.T.C.S. We disagree. As stated above, only that information revealing the financial condition of a seller is made confidential under section 8(c). We have marked the type of information that must be withheld under section 8(c). The remaining information must be released to the requestor. We advise the department to review the marked records provided to your office with Open Records Letter Nos. 93-626 and 93-568 (1993) (copies of rulings enclosed) for further direction in marking the examination reports. As it is a criminal offense under the Open Records Act to fail or refuse to provide access to or copying of public records, Gov't Code § 552.353, we reiterate that information relating more generally to a company's business practices that does not reveal specific financial information or general information about the company's overall financial stability is not made confidential by section 8(c) of article 548b, V.T.C.S.

¹If the custodian does not require the requestor to post bond, the custodian may charge the requestor after the request has been fulfilled. An agency may charge a requestor "all costs related to providing the record, including costs of materials, labor, and overhead" unless the request is for "50 or fewer pages of readily available information." Gov't Code §§ 552.261(b), .262(3). Furthermore, if the public information the requestor seeks is intertwined with confidential information, or if the records custodian must conduct an extensive physical search to sort out confidential records, the custodian may charge the requestor for materials, overhead, and labor necessary to delete or separate the confidential information. *See generally* Open Records Decision No. 488 (1988).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Mary R. Crouter". The signature is fluid and cursive, with the first name "Mary" being the most prominent.

Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/LBC/rho

Ref.: ID# 24948

Enclosures: Open Records Letter Nos. 93-568 and 93-626
Marked documents

cc: Mr. Huey Donaldson
P.O. Box 1476
Kilgore, Texas 75663
(w/o enclosures)